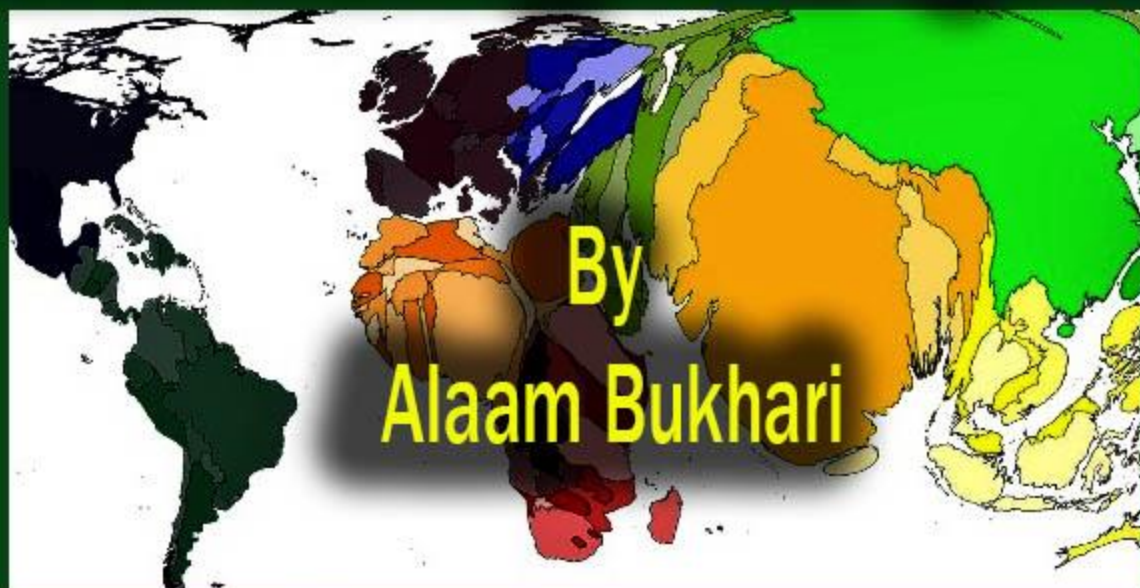


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The Constitution of Pakistan Issues Challenges and Options



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The Constitution of Pakistan Issues: Challenges and Options

Alaa M. Bokhari*

Abstract

On August 14th, 1947, Pakistan was carved out on the map of the world for the Muslims of India in order so that they could live in peace and harmony, according to the principles of Islam, free to pursue all spiritual and worldly endeavours in a homeland of their own. Though full of hope and nationalistic fervour; the people of Pakistan were unable to fully realize the dream of their own personalized utopian state because of a variety of devastating crises plaguing the newly born state. From the problems of the refugees to the crippling water and food shortage to the failing health of the father of the nation and a serious lack of capable political leaders at the helm of the state, the resultant ominous delay in constitution-making caused serious issues that were to plague Pakistan for the year to come. The lack of consensus between the two wings of the state in all matters ranging from the relationship between Islam and the state to the issue of selecting the national language causes Pakistan to be without a constitution for nearly nine years and in a state of perpetual political chaos and instability. Two constitutions and numerous heads of state later, in 1973 a constitution was formulated that had been the product of a democratically elected legislature. However, it failed to create a balance of power between the various branches of government and especially the balance between the powers of the army and the government. Numerous such issues and the challenges faced by the constitution today are discussed in the following pages and several thought provoking options have also been suggested with particular emphasis of strengthening the legislature and making the parliament the true sovereign body it needs to be.

Introduction

Pakistan was a ray of light, a beacon of hope, a homeland for the Muslims of India, where they could live their lives according to their own unique values and customs, where they could "experiment" and create a state suited to their needs and where they could live in peace and harmony; setting a fine example for the other nations of the colonized world. That was the aim of attaining Pakistan, the aim of all the hardwork of the Muslims of India and all that hardwork had paid off on August 14th, 1947 when Pakistan became a sovereign and independent state but unfortunately the ray of light

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began to grow dim as the darkness in the circumstances surrounding the birth of Pakistan began to close in. Pakistan had to face a series of grave predicaments early on. The problems of a geographically split state separated by miles of hostile land, the worn out and tattered refugees coming in from India, the water crises, the food shortage, the non-cooperative and often belligerent attitude of the Indian government, the communal carnage, the early death of the father of the nation and the fact that the Pakistan truly had nothing to work with either in terms of physical resources or in terms of capable leaders, all resulted in a state that though dreamed of soaring in the sky, was actually falling deeper and deeper into the abyss – the abyss of lawlessness, confusion and just general chaos.

The single-most glaring result of this chaos was Pakistan's failure to frame a constitution. A constitution was badly needed by Pakistan, as is needed by all states. It is the constitution that gives a political and authoritative voice to the social interests and demands of the people. A constitution contains a *set of decision rules – the basic rules governing how decisions are made, setting up agencies and offices with special powers, assigning them territorial and functional jurisdiction*.¹ It establishes the main organs of government – the legislature, executive and judiciary and also establishes their working and demarcates their jurisdiction. A constitution provides the framework under which people are governed and in the case of Pakistan was to provide order to the chaos that she had inherited at the time of her birth. However, the political crises plaguing Pakistan made such an endeavour exceedingly difficult. Finally in 1956, the law of the land was made but unfortunately continuing political instability resulted in the supreme law to be abrogated by a military dictator. Ironically the same dictator gave a new law in 1962; however that law was as acceptable to the masses as he was and with the departure of the dictator too departed the constitution.

It was only after losing half of herself and after enduring a series of changing heads of states, political systems and constitutions that Pakistan managed to frame a constitution that had atleast the semblance of a consensus. The constitution of 1973 was framed by the representatives of the people of Pakistan. Being a product of democracy it was the beacon of hope that Pakistan longed for, the one that was to give order to the chaos and insecurity plaguing the state but in reality it was no magic wand. The issues surrounding its framing remained and some new ones even arose. Challenges are being faced and solutions need to be worked out. All in all, the constitution of 1973 is the supreme law of the land and has the capacity to be the panacea for all ills but the dilemmas that Pakistan continues to face have made smooth sailing a myth. Nonetheless the answers and the solutions lie in the constitution and that is where one has to look.

The Framing of the Constitution of Pakistan

The undisputed leader of the Indian Muslims and in turn of the Pakistani people, Mohammad Ali Jinnah had done the impossible and had given the Indian Muslims a land to call home. He took it upon himself to stabilize this new state, dealing with every problem facing every challenge. However, when it came to framing the constitution of Pakistan, he did not desire to go it alone but rather wanted the principles of democracy to be upheld and to flourish in Pakistan. He realized the importance and need for a viable and pertinent constitution that would have dealt with all the issues and everyone knew that he could frame the constitution of the state that

would be willingly accepted by all but he did not want to set a precedent in which one who seemed to think that he had all the answers would forcibly impose his will and sideline the democratically elected representatives of the people – even if that one man did have all the answers.

Thus the Constituent Assembly, created on July 26th, 1947, set to task of framing the new constitution and serving as the sovereign, unicameral federal legislative body, after its inaugural session on August 10th, 1947. Till the time that a new constitution was in place, the Government of India Act, 1935 was in place after certain adaptations, according to the provisions of the Indian Independence Act of 1947. The Constituent Assembly created several committees and sub-committees to shape the future constitution. The *Basic Principles Committee* was one of the most important which was appointed on March 12th, 1949 to report in accordance with the Objectives Resolution, which had been passed the same day by the Constituent Assembly. The resolution on the 'Aims and Objects of the Constitution' or the Objectives Resolution, as it is more popularly known, was the foundation of all future lawmaking in Pakistan and it would seem that after such a comprehensive system of guidelines that not only made clear the position of Islam in the state and the government working, but also pointed out the liberties and rights extended towards the minorities for their uplift and development, formulating the constitution of Pakistan would be a relatively simple matter, but in reality there was a visible divide between the Muslim majority and Non-Muslim minority as the latter had suggested certain amendments that were plainly rejected by the former, causing suspicion and acrimony to mar the delicate relationship between the communities and complicating the already tedious task of formulating the constitution.

Nine years after independence and numerous governments, protests, threats and 670 proposed amendments later, a constitution was adopted on February 29th, 1956. Divided into 13 parts and 6 schedules, the 234 Articles of the written Constitution of 1956 sought to incorporate the principles of Islam, by naming the country the *Islamic Republic of Pakistan* and mentioning the sovereignty of God in the preamble, and described a complicated federation, signifying an elaborate relationship between the centre and the provinces and giving a special place to the fundamental rights of the citizens or more commonly known as a 'bill of rights'. Parliamentary form of government was decided with a unicameral legislature, 300 seats of the National Assembly divided equally between both wings of the state and the members were elected on the basis of adult franchise. Judiciary was to remain independent. Urdu and Bengali were both accepted as state languages.²

Despite the fact that it was adopted after nine years of hard labour, the Constitution was not without its faults. These faults were sidelined at the time of its adoption but they soon resurfaced due to the politically unstable environment. Though the Constitution provided a parliamentary form of government, in reality President Mirza was a politically stronger man than Prime Minister Chaudhri Mohammad Ali and the declining powers of the Muslim League in the coalition government in the centre only made matters worse till finally the Prime Minister resigned on September 8th, 1956 and was replaced Suharwardy from East Pakistan. However, stability in the state was a long way off and Prime Ministers entered and exited through what seemed like a political revolving door with a total of four Prime Ministers coming to office between

1956 and 1958 till the eventual proclamation of the Pakistan's first martial law on October 8th, 1958 by Iskander Mirza, and the death of the Constitution of 1956.

After ousting Mirza, Ayub Khan became the president of Pakistan through his system of Basic Democracies and set to work reshaping Pakistan's political structure. He formed a committee under Justice Shahabuddin on February 17th, 1960, to evaluate the reasons why parliamentary form of government had failed in Pakistan (*without first determining if indeed it had failed*). The committee submitted its findings on May 6th, 1961 and it was examined by Ayub and his Cabinet but the constitution made (March 01, 1962) was quite different³ as Ayub rejected numerous recommendations of the report. As is under a presidential form of government, the "President" became an all powerful figure in the appointments and dismissals of Governors, ministers and members of various other administrative units, however, the necessary 'separation of powers' was omitted as the President was made an integral part of the unicameral central legislature⁴, and given the authority to summon and prorogue the National Assembly.

Seven years, numerous political and economic upheavals, protests and a war with India later – Ayub Khan left the scene and took his constitution with him after imposing martial law on March 25, 1969. The first ever general elections were held under the new Chief Martial Law Administrator General Yahya Khan according to the LFO he introduced, abolishing One-Unit, ending East West parity and utilizing adult franchise. Due to lack of effective conflict resolution skills, East Pakistan separated on December 16th, 1971 becoming independent Bangladesh and Pakistan was left with only her western territories and a new elected government of Zulfikar Ali Bhutto.

Martial Law was lifted in April 1972 and a Constitution Committee, comprising of members of the Government and Opposition and headed by Abdul Hafeez Pirzada, presented a draft report on the Constitution on December 21st, 1972 which was passed unanimously by the National Assembly but after much negotiations and compromises, on April 10, 1973 and enforced on August 14, 1973.

Twice the Constitution has been suspended, when the Martial Law was imposed on July 05, 1977, and, later, when the fourth military coup took place on October 12, 1999. Altogether fourteen amendments have been made in the constitution and it is widely felt that the Constitution of 1973 is no longer how its framers and adopters had envisioned it to be.

The Constitution of 1973

After losing half the state, Zulfikar Ali Bhutto, Prime minister from 1971 to 1977, lifted martial law within several months after his election, and after an "interim constitution" granting him broad powers as President, a new constitution was promulgated in April 1973 and came into effect on August 14 of that year. This constitution represented a compromise consensus on three issues: the role of Islam; the sharing of power between the federal government and the provinces; and the division of responsibility between the president and the prime minister, with a greatly strengthened position for the latter. Bhutto stepped down as president and became prime minister. In order to allay fears of the smaller provinces concerning domination by Punjab, the constitution established a bicameral legislature with a Senate, providing equal provincial

representation, and a National Assembly, allocating seats according to population. Islam was declared the state religion of Pakistan.⁵

It is due to the immense effort and struggle that went into framing the Constitution of 1973 that it is thought to be the shining example of effective law-making as it was unanimously adopted by a democratically elected government. Perhaps for this reason it has only been suspended rather than be abrogated as the constitutions of the past had been. Nonetheless, the constitution of 1973 is facing some unique issues and challenges which require equally ingenious solutions but most of all, require political stability and harmony within the three pillars of the state.

Issues

Numerous issues were dealt with in the 26 years till Pakistan got a unanimously accepted constitution. The biggest issue that plagued Pakistan at the time of its creation was that Pakistan was divided into two halves, East and West and separated by eleven hundred miles of hostile territory of India. Secondly, the Eastern half – though only one province, was home to more people than all the provinces in the Western half put together. On the other hand, the West half occupied the majority of the land of the state. The social fabric of each half was just as divided as the state was, in terms of language, culture and even political structure. Thus each time a constitution was drafted or proposed, the tussle between the East and West and their issues of parity and provincial autonomy proved to be a great hindrance in law-making.

As far as political issues are concerned, the place of Islam in the state and law has also been one of contention not just between Muslims and Non-Muslims of the state but between different sects of Muslims as well. Though Islam was made the state religion and in his speech about the Objectives Resolution, Prime Minister Liaquat Ali Khan had explained that Pakistan was not only to be a place where Muslims were allowed to practise their religion but a state which would facilitate Islam and its followers, meaning that Islam was to have a very prominent position and role in the working of the state. However, the policymakers failed decide on how to incorporate Islamic teachings into the working of the system and give Islam the position it deserved in the Islamic Republic, and seemingly paved the way for such horrors as Zia-ul-Haq's Islamization and Hudood ordinance.

What truly marred the entire constitution-making journey was obvious lack of political leadership that had cursed Pakistan so early on. Unlike the great federations of the United States and India, whose founding fathers had build their nations from ground up, Pakistan became an orphan just one year after her birth with the death of her true leader and founder Mohammad Ali Jinnah followed by the assassination of his right-hand man, Liaquat Ali Khan in 1951. The military and the bureaucracy forming the state elite, however unduly interfered in the political matters time and again, destabilizing the system each time.

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Challenges

Going through the lengthy and detailed written document, one can see the challenges the framers of the constitution were faced with. The fact that both parliamentary and presidential forms of government failed to stabilize the nation-state was of much concern to the constitution-makers. The only way Bhutto agreed to a parliamentary form of government was by making the office of Prime Minister incredibly powerful with respect to that of the President. The President was not to appoint the Prime Minister from the NA, he had no veto powers with respect to legislation, he was to act upon the binding advice of the Prime Minister and he was only to dissolve the NA on the advice of the Prime Minister. The President could be removed by two-thirds majority in the joint session of the parliament. On the other hand, a vote of no-confidence against the Prime Minister could only be moved if the name of a successor was also provided and in case of failure of such a vote to oust the Prime Minister, such a resolution could not be moved again for a period of six months. However, all these safeguards were reversed by the Eighth Amendment Act 1985, which added a clause to the Article 58 giving to the President the power to dissolve the National Assembly in his discretion, making the assembly subservient to the President and once again changing the form of government. After being inducted in the Constitution, this clause was invoked by the President on four occasions in a short span of nine years between 1988 and 1996. This clause was repealed in the Thirteenth Constitutional Amendment passed on April 04, 1997 and which restored the

parliamentary character of the Constitution. However, the Seventeenth Amendment once again shifted the pendulum to the side of the President. The President can now once again dissolve the National Assembly at his discretion.⁶

As is needed in a state with such ethnic diversity as Pakistan and in keeping true to the vision of the founding fathers, a federal form of government was prescribed by the Constitution, with provinces having jurisdiction and legislative powers over their province while the federal jurisdiction was over the entire state. The legislative powers were divided into two lists, the Federal List, comprising of 67 items and in which were enumerated subjects on which the Federal Centre alone could legislate and the second Concurrent list, having 47 items and on which both the Centre and the provinces were entitled to legislate, but in case of conflict the federal law was to prevail. The Chief Justice was to appoint an arbitrator to settle a dispute between the centre and provinces. The Constitution however failed to provide a separate list for sole Provincial legislation and also allowed for a highly centralized

Unlike in the previous constitutions, this time a bicameral parliament was provided with the Senate (Upper House) giving equal representation to the units and the National Assembly (Lower House) allocating seats to each province according to population. The Senate was meant to be a check to the NA, where the Punjab, with a greater majority will be the dominant factor in decision-making.

Thus the Constitution provided numerous safeguards in order to maintain a stable and prosperous system but it was not enough. A series of amendments have caused the original text and meaning of the Constitution of 1973 to be lost and ironically they have aggravated the issues already plaguing the system. At present, General Musharraf's Constitution (Seventeenth Amendment) Act, 2003 has once again made the office of the Prime Minister subservient to that of the President's. The Legal Framework Order (LFO) revived Article 58(2)(B), 112(2)(B), introduced the National Security Council (NSC) with military members superseding the civilian authority of the NA and Senate, and allowed General Musharraf to simultaneously be the Chief of Army Staff and the President of Pakistan. It would certainly not be unfair to question the 'democratic' nature of the current system.

In the government's attempt at bringing democracy to the people, the local governments have been given the powers of the provincial governments, according to the devolution plan – but the central government has yet to devolve its powers. In essence the President is controlling the local governments directly while the provinces are left empty handed.

Options

As the constitution stands today, it is lengthy and complicated and the legislature, executive and judiciary working under it are in a state of confusion. The question is still being raised as to which form of government would suit Pakistan – parliamentary or presidential. Each has its merits and demerits and one can go one citing examples of US, Great Britain, France, India and even China with its communist but highly successful system that has propelled them to the status of economic giant and soon to be superpower, but Pakistan has her own requirements. It is assumed that parliamentary system has failed to provide the necessary system of checks and

balances required for a stable government. In actuality the parliamentary form of government envisioned in the original Constitution of 1973 was more than adequate in safeguarding the legislature, executive and judiciary. Originally, the National Assembly was safe from any malicious attempt from any single individual. In the Presidential form of government, all the powers will lie with a single individual and as far as Pakistan is concerned, the legislature, made up of corrupt and weak political figures, will not prove an adequate check on the all powerful President, especially if he is one in uniform – a contingency which Pakistan has to unfortunately plan for while looking at its past record. The President may have only ceremonial roles with a few discretionary powers. He may not have the power to veto a bill, he may only be able to send it back to the legislature with proposed amendments which are not binding on the Parliament and the latter may then pass the bill with two-thirds majority in a joint session. Thus Pakistan needs a parliamentary form of government in which the Prime Minister is chosen from the people's representatives and is answerable to the legislature alone.

As opined, Pakistan has to make a contingency plan for military interference as currently the military is the strongest institution in Pakistan, getting majority of the GDP and there are no immediate plans for any change in the scenario. Secondly, the Pakistani nation has never vehemently opposed military intervention, rather at times has lauded it. Thus it could be possible to have a retired military officer as the figurative head of the state i.e. the President, one who is chosen by direct elections as in this case the interest of the people will be aroused and it will be followed by a vote of confidence by simple majority in each house.

A bicameral legislature is needed by Pakistan as was provided in the Constitution of 1973 because of the grave difference between the four provinces. However, the Senate needs to have greater powers as it is the only institution that provides parity to all four provinces, irrespective of size, population, etc. Joint sessions need to be required for the passing of any bill and two-third majority be essential for important bills such as money bills while simple majority may suffice in other cases. Senators must also be directly elected by the people. Members of each house must hold a valid degree of atleast Bachelors. The NSC needs to be dismantled or made subordinate to the National Assembly by making it answerable to the NA or Cabinet and not the President. Amendments to the constitution must require two-thirds majority in a joint session of Parliament and in case of amendments to increase or decrease powers of any institutions the two-thirds should be required but after a lapse of six to nine months such a vote must be cast again in order to bring the amendment into effect.

The most contentious issue in Pakistan has been and continues to be the relationship between the centre and the provincial units. No state can truly be a federation if it is centralized to the extent that Pakistan is. Case in point is the delay in the NFC award that has caused unnecessary harm to the provincial governments. Secondly, there needs to be explicit mention of the items in the provincial list – which also needs expansion – and these items should be under the sole jurisdiction of the province. In other words the concurrent list needs to be replaced by a provincial list. The centre should retain authority on matters of Foreign Relations, Money, Defence and Communication but Education needs to be dealt with by the provinces. Provisions can be taken by the government to ensure quality education by taking nation-wide tests for

higher education etc. and the provinces need to work together so that an individual getting a degree in one province is eligible for a post in another province as well.

Disputes between the centre and the provinces may be settled by the judiciary, which is to remain independent. To keep the judiciary strictly separate from the other two organs of the government, a committee or a small body can be made of the existing and retired justices of the Supreme Court that should appoint new judges by advising the President and that advice must be binding on him. The option of Judicial Review should be available. Furthermore, the all legislation and amendments must be according to Islamic rules and regulations and as such maybe analyzed prior to adoption by the relevant Islamic bodies or committees. Their advice may not be binding but in case of objections, a lapse of three months will be required for adoption by a two-thirds majority in a joint-session of Parliament. The duality of criminal and Islamic law must also end. There needs to be an amalgamation of the two as currently the Islamic laws are serving the purpose of a white elephant or as source of torture for the Pakistani public as the laws are misconstrued, harsh and just plain cruel. Once again a two-thirds majority in a joint session would suffice to overcome any extremist elements in the Parliament. A nation-wide consensus among the people should also be taken as promulgating Islamic laws is at the very core of the existence of Pakistan and as such deserves the direct involvement of the Pakistani people and not just having their representatives argue the matter. Perhaps a nationwide referendum can take place after a nationwide debate with different points of view being discussed and highlighted in the eyes of the public and the media so that people are thoroughly aware of the issues and are in complete understanding of what kind of Islamic law and order system can be put in place in Pakistan. Though majority of the Pakistani public is illiterate, it is the duty of the elected representatives to make their constituents aware of the entire situation and though the job is tedious it is required for the prosperity and success of the nation-state.

Finally, the serious issue of being able to demolish the legislature as if it was a measly house of cards needs to be addressed. Strong and restrictive provisions need to be made in this respect. It is suggested that the Senate should remain as a permanent body with members serving tenure of three years and not more than three terms. The National Assembly (Majlis-e-Shoora) may only be prorogued by a two-thirds majority in the NA. The Assembly will not dissolve immediately but after a period of three months such a vote will be taken again and if the necessary majority is achieved, the Assembly be dissolved on the condition that elections will be held immediately after the dissolution.

The Prime Minister, executive head of the state, can only be ousted by a vote of no-confidence with two-thirds majority in the joint session of Parliament. Then after a period of three to six months such a vote needs to be taken again and a successor must be named in order to remove the Prime Minister.

Such provisions might seem harsh but while analyzing the political history of Pakistan one cannot help but wonder if even these safeguards are enough. The Constitution is the supreme law in a state and as such must not be tampered with on a whim as has been done in the past. It would also be wrong to put the blame squarely on the shoulders of the military and bureaucracy, though not preposterous, but as was seen in the Bhutto regime, politicians have their share of demons and they need limits as

well. That is why the people's representatives in each house will prove the best check on each other. That coupled with a free and vigilant media will provide the necessary safeguards for a stable and prosperous political system – one run by the rule of law.

Conclusion

Pakistan is a proud country – a nuclear power, a geo-strategic and geo-political asset – but one that has been plagued by one crisis after another since her birth. Externally plagued by issues of security, refugees, water and food shortages, and internally by sectarian and ethnic divides, tantrums of power-hungry yet politically inept military and non-military men at the helm of the affairs and just plain political immorality and debauchery by the political parties involved, robbed the Pakistani nation of a stable and conducive constitution and political system. The ethnic divide between the East and West was aggravated by the territorial distance between them and the discriminatory attitude of the state elite against the majority population. Furthermore, the suspicions that arose early on regarding the rights of Non-Muslims and the place of Islamic laws vis-à-vis the minorities all caused a delay in the adoption of a viable constitution. The political parties were weak and inept, suffering from a severe shortage of effective leadership and an acute case of gerrymandering. Instead of building the state on the principles of Islam, they were used as tools of subjugation and for power accumulation. After the break-up of the state, the state elite had no change of heart and continued to unduly dominate three-fourths of the state. Jinnah's vision of framing a working Constitution in even two years⁷ did not come true due to these overwhelming hindrances and series of debilitating events. It is the power struggle between the centre and the units and the politicians and military that has caused grave upheaval in the state and has maligned the political process and has made a sheer mockery of the constitution. However, Pakistan has against all odds achieved numerous accomplishments; most importantly it has accomplished the vision to see beyond all the issues and challenges facing her today and has begun to look towards the future – a future of options and a future of possibilities. Pakistan and her policy and constitution makers must realize the mistakes of the past and present and give each their due share and due position in the state, particularly to the federating units as a federation is only as strong as her units and a constitution is only as practical as those who observe it.

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